

**COURT OF APPEALS OF THE STATE OF
WASHINGTON
Division III**

Court of Appeals No. 350495
Okanogan County Superior Court No. 15-2-00444-3

WORK-FORCE SOLUTIONS, INC.,

Plaintiff/Appellee

v.

ANTOINE CREEK FARMS LLC,

Defendant/Appellant

REPLY BRIEF OF APPELLANT

Timothy B. McCormack, WSBA #28074
McCormack Intellectual Property Law Business Law P.S.
300 Queen Anne Ave. N., Suite 400
Seattle, WA 98109
(206) 381-8888
tim@mccormacklegal.com

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INTRODUCTION

The trial court in this case disregarded the summary judgment standard by “not believing” the evidence submitted by the non-moving party Antoine Creek Farms LLC (“Antoine Creek”) and resolving factual inferences in favor of Work Force Solutions, Inc. (“Work-Force”). Work-Force was the party seeking summary judgment. The trial court's decision turns the summary judgment standard on its head. On summary judgment, all factual inferences must be resolved in favor of Antoine Creek as the non-moving party. By disregarding the summary judgment standard, the trial court denied Antoine Creek its right to trial on the merits of questions of fact. The decision of the Okanogan County Superior Court should be reversed and the case remanded for trial on the merits.

ARGUMENT

1. Standard of Review

Appellee does not dispute that an appellate court's standard of review of an order granting summary judgment is *de novo*. *Quinault Indian Nation v. Imperium Terminal Services*

LLC, --- Wn.2d---, 387 P.3d 670, 675 (2017) (*citing Michak v. Transnation Title Insurance Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003)). Nor does Work-Force contest Antoine Creek's quoted standard for summary judgment: “summary judgment is proper if there is no genuine issue as to any fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could reach only one conclusion from the evidence presented.” *Id.* (*citing Bostain v. Food Express, Inc.* 159 Wn.2d 700, 153 P.3d 846 (2007)).

Respondent Work Force's claim that there is a “burden shifting scheme” applicable to summary judgment proceedings muddles the standard. While courts have held that the burden shifts to the non-moving party to present factual affidavits, courts uniformly require that evidence be viewed in a light most favorable to the non-moving party and that all factual inferences be resolved in favor of the non-moving party. *Id.* The burden shifted is “one of production not of persuasion.” *See Carle v. McChord Credit Union*, 65 Wn. App. 93, 98, 827 P.2d 1070 (1992). “The burden of production is applied by the

judge. . . . The burden of persuasion is applied by the trier of fact.” *Id.* Antoine Creek did in fact present extensive and detailed factual affidavits and documentary evidence sufficient to establish genuine issues of material fact for trial.

2. The Court Erred in Dismissing Antoine Creek's Breach of Contract Counterclaims.

There is more than sufficient evidence from which a reasonable fact finder could conclude that Work-Force breached its contractual obligations to Antoine Creek.

Antoine Creek filed affidavits showing that Work-Force had obligations to conduct criminal background checks and drug tests and to provide enough qualified workers to fill Antoine Creek's needs at harvest time. The affidavits and exhibits further establish that Work-Force failed to perform these obligations. McCORMACK DECLARATION ¶¶ 14, 16-18 (CP 38-39); DECLARATION OF JOE BIGHOUSE, ¶¶ 8, 10-20 (CP 114-116).

Work-Force's own screening summary document, Exhibit 4 to Mr. McCormack's Declaration, shows that Work-Force

failed to conduct either a criminal background check or drug screening or both for fully half (16 out of 32) employees listed on the summary. McCORMACK DECLARATION, EXH. 4 (CP 83).

Work-Force's Brief of Respondent does not deny that Work-Force's own summary document proves its failure to conduct criminal background checks or drug screening as promised. Instead, Work-Force's Brief argues that Mr. Bighouse's affidavit lacks a “foundation to show how he acquired any knowledge” about Work-Force's background checks and drug screening. Brief of Respondent at 11. The argument is specious in light of documentary evidence in the record demonstrating that background checks and drug screening were not done as promised.

In its Brief of Respondent, Work-Force continues to press an argument that Antoine Creek did not provide sufficient detail about how it was damaged by the contract breaches.

The Declaration of Joe Bighouse specifically states that several workers were caught using marijuana on the premises,

and Antoine Creek had no choice but to fire them.

DECLARATION OF JOE BIGHOUSE, ¶ 16 (CP 115). Both the Declaration of Tim McCormack and the Declaration of Joe Bighouse describe over \$75,000 in increased labor costs resulting from Work-Force's failure to screen and background check workers as promised. Mr. McCormack's declaration states:

Work-Force Solutions' actions by loss of qualified workers, lost productivity, lost revenue and estimates that it overpaid Work-Force solutions by a significant amount to be determined, caused damages to Antoine Creek Farms. These damages are yet to be determined, but at least in excess of \$75,000. I base this on a comparison of the cost, yield, and productivity of the 2014 and 2015 harvests.

McCORMACK DECLARATION ¶ 20 (CP 39). Mr.

McCormack goes on to explain:

[On] the specific issue of increased harvest costs, we now have two harvests and based on those harvests, including volume, yields, workers hired, and related factors, it is clear that Work-Force Solutions' negligence caused Antoine Creek damages to be proved at trial by failing to provide

qualified agricultural workers

McCORMACK DECLARATION ¶ 21 (CP 40).

Mr. Bighouse's declaration confirms the evidence
provided by Mr. McCormack:

In my experience, as a result of the
lack of quality employees Work-Force
Solutions provided, the harvest and
other work took longer than it should
have causing the labor costs to
increase.

Preliminary estimates of damages to
Antoine Creek Farms as a result of
Work-Force Solutions' failure to
provide adequate and qualified
staffing, lost productivity, and lost
revenue are at least in excess of
\$75,000. In addition, there are
unknown damages likely to result
from potential bad publicity and other
errors and omissions left to uncover
based on Work-Force Solutions'
failure to conduct background
screenings on employees . . .

DECLARATION OF JOE BIGHOUSE ¶¶ 22-23 (CP 116).

Work-Force also claims that Mr. McCormack, on behalf
of Antoine Creek, told Work-Force to use its “best judgment on
who to send,” and that “[Antoine Creek] needed people ASAP”
even if they were “light' criminals or reformed.” Even if taken

as true, this is a far cry from consenting to Work-Force foregoing screening entirely as to half the workers it sent. Work-Force promised to provide workers who were screened for drugs and for criminal backgrounds. Work-Force's own document shows that it failed to do this as promised as to more than half the workers provided. This is a breach of contract, and it caused damages to Antoine Creek. These damages must be offset against any amount Antoine Creek is determined to owe Work-Force. The exact amount of these damages is an intensely factual issue which much be determined at trial.

3. The Court Erred in Dismissing Antoine Creek's Claims Under the Consumer Protection Act.

Work-Force's misconduct gives rise to a claim under the Consumer Protection Act. Work-Force agrees in its Brief of Respondent that a claim under the Consumer Protection Act is established by proving: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco*

Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Brief of Appellant at 19. Work-Force claims, however, that Antoine Creek failed to submit evidence of a “pattern or practice of committing a wrongful act, . . . that anyone other than defendant was harmed, . . . that Respondent's conduct caused harm to defendant, [and] that Appellant was harmed.” Brief of Respondent at 19

Antoine Creek did present evidence on each of these issues. Work-Force engaged in a deceptive act or practice by representing that it was conducting criminal background checks and drug screening on all potential employees. As demonstrated by Exhibit 4 to Mr. McCormack's deposition, this claim was blatantly false. Exhibit 4, Work-Force's own screening summary, shows that only half of the 32 employees listed underwent both drug screening and criminal background checks. McCORMACK DECLARATION, EXH. 4 (CP 83).

Work-Force's deception had and will continue to have a public interest impact. The evidence shows that Work-Force represents that it conducts criminal background checks and drug

screenings for all employees. Yet only half of the employees actually underwent both a background check and a drug screening. The impact on the public, including numerous businesses other than Antoine Creek is obvious. Every single customer relying on Work-Force's promised background checks and drug screening for reasons of safety and legal compliance is adversely impacted by Work-Force's deceptive practice.

Finally, Antoine Creek has provided evidence of causation and damages. The declarations of Mr. Bighouse and Mr. McCormack set forth in detail the increased labor costs incurred as a result of Work-Force's failure to provide qualified and properly screened employees.

4. The Court Erred in Determining As a Matter of Law That the Parties Did not Agree on a Payment Plan.

There is a genuine issue of material fact as to whether a Payment Plan was agreed to by the parties. Mr. McCormack's declaration states:

The parties agree[d] to a repayment agreement for the alleged debt in question. Antoine Creek Farms offered to pay off the debt at a rate of

\$500 per month and Work-Force Solutions has accepted these partial payments without exception.

Antoine Creek Farms continues to fulfill these terms by making payments to Work-Force Solutions' attorney's trust account.

Antoine Creek Farms continues to follow the agreed upon terms and continues to do so. The payments have amounted to an additional \$6,000 in \$500 per month installments since August 2015.

Work-Force Solutions previously accepted, before the final repayment agreement, a “Payment Proposal Schedule” agreement for alleged debt owed at the time.

McCORMACK DECLARATION ¶¶ 6-10 (CP 37-38).

Work-Force's Brief of Respondent attempts to rebut Mr. McCormack's declaration by citing correspondence between the parties which Work-Force claims does not mention the payment plan referenced in Mr. McCormack's declaration. Brief of Respondent at 7. Work-Force's claim is a factual argument which cannot be resolved on summary judgment. In fact, the correspondence referenced is consistent with Mr. McCormack's

testimony. The first e-mail message referenced simply states that Antoine Creek has cash flow issues. The second specifically references the agreement to which Mr. McCormack's declaration testifies, stating "I am able to make regular payments of \$500 by the 15th of each month." The third e-mail message also references the same \$500 per month payment schedule.

These email messages do not in any way shape or form show that Work-Force is entitled to judgment as a matter of law on this issue. Taken in a light most favorable to Antoine Creek, the evidence shows that the parties agreed to a \$500 per month repayment plan, which Work-Force breached by bringing suit when payments were not in default.

Work-Force's Brief of Respondent also suggests that Mr. McCormack's testimony regarding the parties' agreement to a payment plan was "conclusory" and that Judge Culp found the testimony was "simply not believable." Mr. McCormack's testimony is not conclusory. As quoted above, it states that the parties agreed on a payment schedule of \$500 per month, that

Antoine Creek offered to pay \$500 per month, and that Work-Force accepted these payments without exception. *See* McCORMACK DECLARATION at ¶¶ 6-10 (CP 37-38). The trial court does not have the power on summary judgment to weigh credibility and determine that one party's testimony is “not believable.” Washington Courts have a long history of rejecting resolution of credibility issues on summary judgment. In *Balise v. Underwood*, 62 Wn. 2d 195, 200, 381 P.2d 966 (1963), the court explained:

When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied.

Similarly, in *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 128 P.2d 633, 637 (2006), the court cautioned:

On motion for summary judgment, the trial court does not weigh

evidence or assess witness credibility. Neither do we do so on appeal: "Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met."

(quoting *Renz v. Spokane Eye Clinic, P.S.*, 114 Wash.App. 611, 623, 60 P.3d 106 (2002)).

CONCLUSION

There are genuine issues of material fact precluding summary judgment. Antoine Creek has provided ample evidence to create genuine issues of material fact as to whether a repayment plan was agreed upon and whether Work-Force failed to do drug screening and background checks and otherwise failed to provide enough qualified workers for Antoine Creek's harvest. Antoine Creek has also provided ample evidence that it was damaged in the form of greatly increased labor and related costs as a proximate result of Work-Force's breaches of contract. The Superior Court's decision baldly states that the trial court is resolving credibility issues on

summary judgment by finding Antoine Creek's evidence "not believable." This finding is not permissible on summary judgment and may only be made after trial on the merits. Accordingly, the judgment of the Superior Court should be reversed and the case remanded for trial on the merits.

RESOLUTION WITHOUT ORAL ARGUMENT

Appellant Antoine Creek hereby requests resolution of this appeal without oral argument pursuant to RAP 11.4(j).

Respectfully submitted this 29th day of
August, 2017.

By 

Timothy B. McCormack
Attorney for Antoine Creek Farms, LLC

MCCORMACK INTELLECTUAL PROPERTY PS

August 29, 2017 - 8:03 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35049-5
Appellate Court Case Title: Work-Force Solutions, Inc., v Antoine Creek Farms, LLC
Superior Court Case Number: 15-2-00444-3

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300 QUEEN ANNE AVE N STE 400

SEATTLE, WA, 98109-4512

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